Supreme Court, U.S.
FILED
96 399 SEP 10 1996
OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

TERRIL FLANAGAN, - - - - - *Petitioner*

versus

DAVID J. CAZALET,
ED CAHILL, and
RUSSELL COUNTY NEWSPAPERS,
INC., as *The Times Journal*, - - *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

ROBERT L. BERTRAM
BERTRAM & WILSON
One Monument Square
Jamestown, Kentucky 42629
(502) 343-3101
Counsel for Petitioner

September 10, 1996

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

QUESTION PRESENTED

Whether a reviewing court may limit the number of possible findings that a jury may have reached in their determination of constitutional malice in a public figure defamation case.

PARTIES TO THE PROCEEDING

All the parties to the within proceeding before the Court whose judgment is sought to be reviewed are named in the caption to this Petition as filed in this Court.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT	2– 3
PROCEEDINGS BELOW	3– 8
REASONS FOR GRANTING THE PETITION	8– 18
I. The Kentucky Court of Appeals Independent Appellate Review Was Limited to What the Jury May Have Found, and This Failure to Consider the Whole Record Violates the Petitioner's First and Fourteenth Amendment Rights	8–14
II. The Kentucky Court of Appeals Failure to Review the Whole Record Creates a Separate Privilege For Opinion, in Violation of the First and Fourteenth Amendments to the United States Constitution	15–17
III. The Questions Presented Are Important	17–18
CONCLUSION	19
APPENDIX	1a–12a

TABLE OF AUTHORITIES

PAGE

Cases:

Ball v. *E.W. Scripps, Co.*, 801 S.W.2d 684 (Ky. 1990), *cert. denied*, 499 U.S. 976 ..... 3, 4, 13
Bell v. *Courier-Journal & Louisville Times Co.*, 402 S.W.2d 84 (Ky. 1966) 4, 6, 8
Bose v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, *affg.* 692 F.2d 189 (1st Cir. 1982) 13
Brown & Williamson Tobacco Corp. v. *Jacobson*, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988) 13, 14
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)15
Greenbelt Cooperative Publishing Assn. v. *Bressler*, 398 U.S.6 (1970) 15
Harte-Hanks Communications, Inc. v. *Connaughton*, 491 U.S. 657 (1989) ... 4, 14, 16, 17, 18
McCall v. *Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982) 4, 6
Milkovich v. *Lorain Journal Company*, 497 U.S. 1 (1990) ..... passim
New York Times v. *Sullivan*, 376 U.S. 254 (1964) ..... passim
Pearce v. *Courier-Journal & Louisville Times Co.*, 683 S.W.2d 633 (Ky. App. 1985) 4
Philadelphia Newspapers v. *Hepps*, 475 U.S. 767 (1986) 15
Tavoulareas v. *Piro*, 817 F.2d 762 (D.C. Cir.), *cert. denied*, 484 U.S. 870 (1987) 13
Yancey v. *Hamilton*, 786 S.W.2d 854 (Ky. 1989)... 5, 14

Constitutional Provisions:

Constitution of the United States
Amendment I 2, 8, 9
Amendment XIV 2, 8, 9
Ky. Const. secs. 1, 8 9

Other Authorities:

RESTATEMENT (SECOND) OF TORTS (1977) .. passim

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

TERRIL FLANAGAN, - - - - - - - *Petitioner*

versus

DAVID J. CAZALET,
ED CAHILL, and
RUSSELL COUNTY NEWSPAPERS,
INC., as *The Times Journal,* - - - *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

The petitioner, Terril Flanagan, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Kentucky Court of Appeals, entered in the above-entitled proceeding on November 3, 1995. The final and appealable order, denying the Petitioner's Motion for Discretionary Review, was entered on June 12, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is reprinted in the appendix hereto, (p. 1a, *infra.)*

The order of the Supreme Court of Kentucky denying the petitioner's motion for discretionary review and ordering the opinion of the Court of Appeals not to be published

is unreported. It is reprinted in the appendix hereto, p. 12a, *infra*.

JURISDICTION

The jurisdiction of this Court to review the judgment and opinion of the Kentucky Court of Appeals is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution require, in public figure defamation cases, independent appellate review of the whole record. *New York Times* v. *Sullivan*, 376 U.S. 254 (1964).

The First Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution neither provide for nor acknowledge an absolute privilege for the expression of opinion. *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1 (1990).

STATEMENT

On May 22, 1993, the petitioner, Terril Flanagan, the incumbent County Judge-Executive of Russell County Kentucky, brought an action for defamation against the respondents, Russell County Newspapers, Inc., doing business as the *Times Journal*, its publisher and editor, David J. Cazalet and its managing editor, Ed Cahill. Petitioner's action was predicated upon errors of fact published by the respondents in a series of editorials in the *Times Journal*. These articles contained numerous factual errors and omissions. The complaint alleged, and the jury found from the evidence presented by both parties, that the three editorials were substantially incorrect and were published with the respondents' knowledge that the facts contained in the publication were false. The jury found that the respondents had maliciously published false facts that related to

the petitioner's conduct of the public office he held. The Kentucky Court of Appeals, pursuant to their independent review of the case, held that the record failed to support the jury's finding that the respondents' publications were false and defamatory and entered an opinion reversing the trial court. A timely Motion for Discretionary Review to the Supreme Court of Kentucky was filed by the petitioner. The Supreme Court of Kentucky denied the Motion, ordering the opinion of the Court of Appeals not to be published. Comes now the petitioner to this Court praying that a writ of certiorari issue.

PROCEEDINGS BELOW

The Kentucky Court of Appeals conducted an independent review of the record and held that, based upon the evidence presented at trial, the record did not support the jury's finding that the editorials contained false and defamatory statements. (App., *infra.*, 10a) Having held that the editorials were not, as a matter of law, false and defamatory, the Court held that it was unnecessary to consider whether Flanagan successfully proved the additional elements of a defamation case and refused to consider the issues of malice or special damages. (App., *infra.*, 11a)

The reviewing Court considered each of the three editorials separately in reaching its opinion. This tripartite analysis was preceded by a general discussion of the applicable law. Following *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), the RESTATEMENT (SECOND) OF TORTS (1977) and *Ball* v. *E.W. Scripps Co.*, 801 S.W. 2d 684 (Ky. 1990), *cert. denied*, 499 U.S. 976, the Court held:

> We have a duty to conduct an independent examination of the whole record...to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression. *New York Times*, 376 U.S. at 285. (App., *infra.*, 2a)

> When the question revolves around the underlying facts as opposed to the issue of actual malice appellate review must still be in terms of what the jury could find as true facts and what the jury could reasonably infer from the testimony of the witnesses when considered as a whole. *Ball*, 801 S.W. 2d at 688, citing *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657 (1989). (App., *infra.*, 2a)

The Court found that the petitioner was a public official and, in a series of annotations, discussed the Kentucky law of libel relative to public figure defamation cases. Prefacing their analysis with insightful *dictum* by the Kentucky Supreme Court opined, "[i]n the parlance of the horse industry, part of the turf of being a public official ...is to be subject to public scrutiny." *McCall* v. *Louisville Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882, 886, (Ky. 1981) , *cert. denied*, 456 U.S. 975 (1982). (App., *infra.*, 3a, n.3) Sequentially, the Court noted the Kentucky law and authority concerning public figure defamation; the first two comments addressed the jurisdiction's law of truth and opinion:

> One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true. RESTATEMENT (SECOND) OF TORTS, sec. 581A (1977). Truth is a complete defense to a libel action in Kentucky. (App., *infra.*, 3a, n.4)
>
> A publication need only be substantially true. *Bell v. Louisville Courier-Journal & Louisville Times Co.*, 402 S.W. 2d 84 (Ky. 1966); *Pearce* v. *Courier-Journal & Louisville Times Co. & Louisville Times Co.*, 683 S.W.2d 633 (Ky. App. 1985). (App., *infra.*, 3a, n.4)

The Court then defined defamatory communication:

> A communication is defamatory if it tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. RESTATE-

> MENT (SECOND) OF TORTS, sec. 559 (1977). (App., *infra.*, 3a, n.5)

The Court then set out the issues for the judge and the issues for the jury:

> It is the function of the court to determine whether an expression of opinion is capable of bearing a defamatory meaning because it may be reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct, and the function of the jury to determine whether that meaning was attributed to it by the recipient of the communication. RESTATEMENT (SECOND) OF TORTS, sec. 566 cmt. c. (App., *infra.*, 3a, n.5)

Concluding its analysis, the Court cited the controlling law concerning the expression of opinion:

> A simple expression of opinion based on disclosed or nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. RESTATEMENT (SECOND) OF TORTS, sec. 566 cmt. c. (App., *infra.*, 3a, n.6)
>
> [P]ure opinion (opinion based on disclosed or nondefamatory facts) is absolutely privileged. *Yancey*, 786 S.W.2d at 857. (App., *infra.*, 4a, n.6)
>
> A defamatory communication may consist of a statement of opinion, but a statement of this nature is actionable only if it implies the allegation of assumed nondefamatory facts as the basis for the opinion. *Yancey* v. *Hamilton*, 786 S.W. 2d 854, 857 (Ky. 1989) (quoting RESTATEMENT (SECOND) OF TORTS, sec. 566 (1977). (App., *infra.*, 4a, n.7)

Based on these legal predicates, the Court of Appeals made findings of fact and conclusions of law concerning each editorial.

The publication of March 26, 1992 stated, *inter alia*:

"A DO-IT-YOURSELF BUDGET"

> County Judge-Executive Terril Flanagan has washed his hands of the county budget. Flanagan presented his proposal which is at least $250,000 over being balanced to the magistrates...Basically he's turned his back on the magistrates again because they wouldn't do what he wanted them to do. He's said to them, "do it yourself."

Following the Kentucky Supreme Court's direction in *McCall*, the reviewing Court reiterated that "defamatory matter must be considered as a whole." *McCall*, 623 S.W. 2d at 884. The Court further held that defamatory words must be measured by their natural and probable effect on the mind of the average lay reader. *Id.* The Court noted that the articles were published in the editorial section of the *Times Journal*, concluding that the average lay reader would "undoubtedly" interpret the statements as the opinion of the author. (App., *infra.*, 6a). Applying the rule of *Yancey* (following the Restatement), the Court held that the language was a "simple expression of opinion" based on disclosed and assumed nondefamatory facts and therefore not actionable, "no matter how unjustified and unreasonable...or how derogatory." (App., *infra.*, 6a) The Court determined from its review of the record that the editorial was based on "allegedly" well known disclosed facts regarding the proposed county budget. (App., *infra.* 6a)

Addressing the respondents' statement that the budget was "$250,000 over being balanced", the Court found that the publication was substantially true and that substantial truth equates to absolute truth and "truth is a complete defense to defamation claims in Kentucky." *Bell*, 402 S.W.2d at 87.

Reversing the judgment and opinion of the trial court, the Court of Appeals held, returning to the authority of the Restatement and *New York Times*, that "truth and

falsity aside" the March 26, 1992 editorial was not defamatory. RESTATEMENT (SECOND) OF TORTS, sec. 559; *New York Times*, 376 U.S. at 269.

The second editorial published by the respondents on December 17, 1992 was captioned:

> "QUESTIONS FOR THE FISCAL COURT"
>
> How could Herlen Lawless, Brad Redmond, Randell Hopper and Flanagan (the members of the Russell County Fiscal Court) vote to spend $50,000 when no one even seemed to know from whom they were buying the insurance or what they were buying?...Was this decision made behind closed doors and then rubber stamped without any real discussion in public?

The Court, observing that the petitioner did not actually vote on the issue, found that the statement was not completely false but "was substantially if not precisely true...lacking 'complete' falsity." (App., *infra.*, 8a). The Court determined that any inaccuracies were minor and that a statement may not be labeled as false if it is based on a minor mistake of fact or if the publication was substantially true. (App., *infra.*, 8a, n.11) Here, the reviewing Court, found from the record that the petitioner was constructively, if not officially, in favor of the insurance proposal; and, that the reported and published dollar amount, although not publicly stated by the petitioner, was reported to the respondent by a member of the fiscal court.

The Court of Appeals reversed the trial court's judgment and opinion, holding that "regardless of truth or falsity" the article, as a matter of law, was not defamatory.

The third editorial, published by the respondents on February 25, 1993, was found by the jury to be substantially incorrect and containing false facts. The article read:

QUESTIONS FOR THE FISCAL COURT
MONTHLY SURCHARGE IS THE BEST WAY TO
FUND DISPATCH AND 911

> However the meeting pointed up once again our concern about Russell County Judge-Executive Terril Flanagan, his attitude about taxing people, and his leadership about county government... Flanagan's suggestion that the dispatch service be funded by the occupational payroll tax shows that he has already begun an attempt to justify renewing the occupational payroll tax.

The Court of Appeals, relying on *Bell*, 402 S.W. 2d at 88, reversed the trial court and found that Flanagan had admitted the truth of the statement. The Court added the incidental *dictum* that by serving as a public official the petitioner "subjected his life to the closest public scrutiny for the purposes of determining whether the rights of the public are safe in his hands. (App., *infra.*, 9a).

The Court of Appeals, in reversing on all matters, held that the record failed to support the jury's finding that the respondents' publications contained false facts and were substantially incorrect.

REASONS FOR GRANTING THE PETITION

I. The Kentucky Court of Appeals Independent Appellate Review Was Limited to What the Jury May Have Found, and This Failure to Consider the Whole Record Violates the Petitioner's First and Fourteenth Amendment Rights

The First Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution require, in public figure defamation cases, independent appellate review of the whole record. *New York Times* v. *Sullivan*. The Kentucky Court of Appeals limited their review, to those issues that the jury might have found, summarily dismissing what the jury did find.

The Kentucky Court of Appeals found it "unnecessary" to consider the "additional" element of actual malice in reversing the judgment of the trial court. (App., *infra.*, 10a) The Court found, pursuant to its independent appellate review, while failing to specifically define or identify it, that "constitutional malice" did not exist, and therefore, the issue need not be addressed. The reviewing Court simply dismissed the petitioner's cause on the de novo factual finding that "truth and falsity aside" and "regardless of truth or falsity" the respondents' publications were absolutely privileged under the First Amendment of the United States Constitution and Sections 1 and 8 of the Kentucky Constitution.[1] (App., *infra.*, 7a) The Court reached this conclusion by finding from the record, despite

---

[1]Section 1 of the Kentucky Constitution, the "Bill of Rights" does not specifically address freedom of the press and guarantees generally:

> Rights of life, liberty, worship, pursuit of safety and happiness, free speech, acquiring and protecting property, peaceful assembly, redress of grievances, bearing arms.—All men are by nature, free and equal, and have certain inherent and inalienable rights, among which can be reckoned:
>
> . . .
>
> Fourth: The right of freely communicating their thoughts and opinions.

. . .

Section 8:

> Freedom of speech and of the press.-Printing presses shall be free to every person who undertakes to examine the proceedings of the General Assembly or any branch of government, and no law shall ever be made to restrain the right thereof. Every person may freely and fully speak, write and print on any subject, *being responsible for the abuse of that liberty.* (Emphasis added).

the jury's evaluation of the evidence proffered by both parties, that: (1) the respondents' publication assumed no implied facts concerning the petitioner or his conduct of office nor did the editorials raise by implication any undisclosed facts underlying the articles, that is, (2) the facts in issue were disclosed, "assumed" undefamatory, and substantially true.

In the March 26th editorial, the respondents' publication stated that the petitioner had presented a budget that was "$250,000" over being balanced. It was proven at trial that the budget was not "$250,000" over budget. Indeed, this factual inaccuracy in publication was admitted by the respondents in their brief to the Court of Appeals. The respondents acknowledged the falsity of the statement, stating that, the *arguably technical inaccuracy* of calling the budget not balanced when its paper figures showed equal revenues and expenditures. The Court of Appeals dismissed this fact by noting that "the average lay reader would *undoubtedly* interpret the statement as the opinion of the author". (App., *infra.*, 6a) The opinion of the author was stated as fact and the fact was wrong! The underlying facts were nonexistent and could not be "assumed" by anyone, much less by the Court of Appeals, in their independent review. The reviewing court further noted that this "opinion" was based upon "*allegedly* well know disclosed facts regarding the terms of the *proposed* county budget." (App., *infra.*, 7a) It defies rational belief how the appellate court, on their olympian banc, could determine how facts were allegedly well known and disclosed when the only testimony on the subject at trial came from the respondents! The opinion of the reviewing court, that the average lay reader, in a rural Kentucky hill county, would know what the underlying facts were in a *proposed* budget is absurd. One doubts that the learned members of this honorable court and its corps of erudite clerks have any inkling of the underlying facts of the proposed budget for the

District of Columbia. This finding, coupled with the respondents' admission of error, negates any issue of even substantial truth.

The editorial of December 17, 1992 likewise stated facts that were subject to the cold analysis of proof. The article said that the petitioner voted to spend $50,000. The petitioner did not vote on the issue at all, much less to spend $50,000. Here the reviewing court's exegesis of the facts would perplex Maimonides (who at least made an attempt to organize law into concepts that were understandable), and stifle scholastic and schoolman. The Court of Appeals found "substantial truth" from the respondents' testimony that they "believed the editorials to be true." (App., *infra.*, 11a) This post-publication belief was evidently co-opted by the reviewing court from the whole record. None of the petitioner's proof to the contrary was considered, nor were the admissions of the respondents. In an opinion that makes extensive reference to what the petitioner admitted, often by inference, the Court has no logical problem finding substantial truth from "believed facts" proven and admitted to be false! The jury found no truth from the whole record. The Court of Appeals found substantial truth from the respondents' record.

The jury's findings were supported by more than adequate evidence that the respondents established a pattern of malice toward the petitioner. The petitioner produced evidence that respondent Ed Cahill, the *Times Journal* managing editor, stated that "*they* were going to get him." Numerous witnesses and the evidence presented by both parties illustrated a pattern of malice displayed by the respondents toward the petitioner. Parenthetically, the *Times-Journal* published many articles critical of Flanagan; the trial court determined only three to evidence actual malice. The reviewing court simply refused to review the record as a whole.

In addition to its failure to consider all the facts in evidence, the reviewing Court failed to address any of the substantive law of public figure defamation. The Court refused to consider and follow this Court's guidance on the law of constitutional malice, opinion, truth and substantial truth and defamatory meaning. Indeed, the reviewing Court bracketed their opinion with *New York Times*, inserting and rearranging in the interstice obsolete state law and Restatement commentary, hoping by judicial calculus to craft an opinion that the Constitution would not support. This euclidean approach to the law of defamation failed to consider or apply the rules of law applicable to constitutional malice, opinion, substantial truth and defamatory meaning. The Court of Appeals conveniently dismissed these constitutional impediments by *refusing to even consider* the petitioner's evidence of actual malice, finding *per curium per saltum* that it did not exist, and therefore need not be considered.

Failing to consider the record as a whole is the first issue before this Court. By failing to consider and apply the applicable law to these issues, the reviewing Court could neither *legally meet nor factually comply* with this Court's constitutional tests to find the petitioner's cause without merit. The Court of Appeals summarily dismissed the complaint without remand or instruction to the trial court to find on the proper law, simply relying on the rubric of *New York Times*.

This Court held, in *New York Times* v. *Sullivan*, that in public figure defamation cases independent appellate review must be of the entire record:

> [W]e examine for ourselves the statements in issue and the circumstances under which they were made to see whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment protect.

> (citations omitted) We must make an independent examination of the whole record. *New York Times*, 376 U.S. at 285.[2]

This Court's affirmance in *Bose* v. *Consumers Union of U.S. Inc.*, 466 U.S. 485, *affg* 692 F.2d 189 (1st Cir. 1982), established de novo review as the correct standard of review when an appellate court must consider constitutionally protected speech. *Harte-Hanks Communications* v. *Connaughton*, 491 U.S. 657 (1989) followed *Bose*, defining what facts were to be subject to independent review.

Independent appellate review requires that the reviewing court consider all the evidence. Further, the reviewing court must affirm the trial court's decision if it is supported by the record. That is, if the evidence supports the jury's determination, which in this case it does. *Brown & Williamson Tobacco Corp.* v. *Jacobson*, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988). Independent appellate review is applicable only to issues of actual malice. *Id.* at 1129. Actual malice is the constitutional threshold of independent review. Clearly, by refusing to even consider the issue of actual malice, the Kentucky Court of Appeals failed to apply this standard as required by the

---

[2]Kentucky has adopted this rule in *Ball* v. *E.W. Scripps*, 801 S.W. 684, (Ky. 1990), *cert. denied* 499 U.S. 976.

[3]The District of Columbia Circuit Court's opinion in *Tavoulareas* v. *Piro*, 817 F.2d 762 (D.C. Cir.), *cert. denied*, 484 U.S. 870 (1987). While affirming the district court's decision to overturn a jury verdict in favor of the plaintiff, the Circuit Court stated that granting judgment as a matter of law was appropriate only when,

> [T]he evidence together with all inferences that can reasonably be drawn...is so one-sided that reasonable men could not disagree on the verdict...considering all the evidence in the light most favorable to the [non-moving] party and abstain[ing] from assessing the credibility of the witnesses or weighing the evidence. *Id.*, 817 F. 2d at 795.

High Court in *Bose* and correctly applied by the Seventh Circuit in *Brown & Williamson*.[3] This Circuit has reiterated the common law standard that the law, on appeal, is applied to the facts, and not the facts to the law. Accordingly, the failure of the Kentucky Court of Appeals to conform to this basic standard, and confining their review to a "limited number of permissible findings" in essence denied the petitioner his right to a jury trial. The assumption that any finding of fact favorable to the defendant created an absolute opinion privilege under the First and Fourteenth Amendments of the United State Constitution is contrary to the rule of this Court. *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1 (1990) As recognized by Justice Scalia in his concurrence in *Harte-Hanks*:

> [W]e would not reverse judgment for the plaintiff, when dozens of other disputed contentions which the jury might have resolved in the plaintiff's favor *would* establish clear and convincing proof. We would, as the Sixth Circuit did, assume that all those disputes were resolved in the plaintiff's favor-unless, of course, we again devised some non-functional category of the remaining disputes that we could look to...I see no basis for consulting only a limited number of permissible findings. I would have adopted the Sixth Circuit's analysis in its entirety, making our independent assessment of whether malice was clearly and convincingly proved on the assumption that the jury made all the supportive findings it could have made. That is what common law courts have always done, and there is ultimately no alternative to it. *Id.*, 491 U.S. at 700.

The Kentucky Court of Appeals, relying on *Yancey* v. *Hamilton*, 786 S.W.2d 854 (Ky. 1989), and following the Restatement, found an absolute constitutional protection for opinion based upon a selective review of the record.

II. The Kentucky Court of Appeals Failure to Review the Whole Record Creates a Separate Privilege For Opinion, in Violation of the First and Fourteenth Amendments to the United States Constitution

The First Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution neither provide for, nor acknowledge, an absolute privilege for the expression of opinion. *Milkovich* v. *Lorain Journal Co.*

The second issue before the Court, in this case, is the absolute right of opinion. The Kentucky Court of Appeals failed to follow the Supreme Court's direction in *Milkovich,* in which it held that the First Amendment does not create a privilege for expressions of opinion. Noting that the First Amendment does not require a separate "opinion" privilege limiting the application of state defamation laws (citing *New York Times*), the Supreme Court established the basis for a public figure defamation action.

First, the *Milkovich* court held, following *Philadelphia Newspapers* v. *Hepps,* 475 U.S. 767 (1986), that statements on matters of public concern must be provable as false before liability can be assessed. *Milkovich,* 497 U.S. at 15. In petitioner's case, facts were proven false.

Citing *Greenbelt Cooperative Publishing Assn.* v. *Bressler,* 398 U.S. 6 (1970), the Supreme Court held that statements that cannot reasonably be interpreted as stating actual facts about an individual are protected. *Milkovich,* 497 U.S. at 16. In the articles published by the respondents, facts were reasonably interpreted to be of and concerning the petitioner concerning his conduct and administration of his office.

Finally, the Court held that the "opinion privilege" as presumed by lower courts relying on *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974) was a result of "mistaken reli-

ance" on language the Court now considered as *dictum*. *Milkovich*, 497 U.S. at 18. That is, statements of opinion are never false, but false statements of opinion may be defamatory. The *Milkovich* court held that First Amendment interests were "adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between 'opinion' and fact." *Id.*, 497 U.S at, 19. Kentucky courts still acknowledge this dichotomy. The Kentucky Court of Appeals, in refusing to consider the evidence as a whole, created this very artificial dichotomy between opinion and fact.

In the case before this Court, the reviewing court held that the record failed to support, as a matter of law, the jury's finding that the three editorials cited as a basis for the petitioner's claim contained false and defamatory statements. This judicial divination of the evidence led the Court of Appeals to conclude that, since the first element of a valid defamation claim was not satisfied, "it would be unnecessary for us to consider whether [the petitioner] successfully proved the additional elements of a defamation case." (App., *infra.*, 11a) Here the Court misconstrued *New York Times*, interpreting that case to allow plenary selection as well as interpretation of the evidence leading to the creation of the artificial dichotomy addressed in *Milkovich*. This erroneous application of *New York Times* and its corresponding result can only be avoided when reviewing courts apply the direction of *Milkovich* and follow the rule of *Harte-Hanks* as stated by this Court. Appellate courts must conduct a searching and dispassionate review of the entire record. The jury makes a finding in this case, examining evidence of fact, subject to proof or disproof, whether events occurred or did not occur, and found actual malice. The reviewing court may not controvert that jury finding by its own opinion of what the jury "may" have found. The Court of Appeals did not attempt to make an independent evaluation of the credibility of the

conflicting testimony concerning the jury's finding of actual malice. Instead the reviewing court isolated facts, dissecting the record, to reach a conclusion based on a false dichotomy of opinion and fact, confusing the question of actual malice with substantial truth.

III. The Questions Presented Are Important

The issue of actual malice is a predicate, and not a conclusion, in the law of public figure defamation. The existence or non-existence of actual malice must be derived from the whole record and not from bits and pieces of evidence or the evidence favorable to one party only. The record on appeal is neutral. In this case, the Court of Appeals simply ignored the facts favorable to the petitioner, and the substantive law of defamation. Unfortunately, therefore, the proper application of that law is not before this Court.

That is the real issue underlying this case; and, it would be of great assistance to this Court, and to the benefit of constitutional clarity, for the respective parties to submit detailed briefs on these issues of law. There are diverse and conflicting lower court opinions and interpretations of this law. The Federal Circuits hold varied views concerning "opinion", "substantial truth" and indeed the definition of "constitutional malice." These issues are inextricably bound up in this case, as they are in all cases that reflect the continuing struggle with *New York Times* and its progeny. The thirty year old policy considerations of that historic case, and the need for this Court to make a legal synthesis of the law of public figure defamation, must be addressed. Justice Scalia's clarion call in *Harte-Hanks,* for a return to common law sanity, must be heard. These worthy considerations aside, the two issues before the Court in this action are the constitutionally mandated rule that due process requires a court, on independent appellate re-

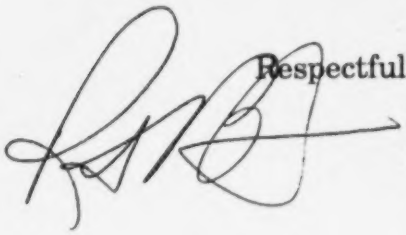
view, to examine the whole record, and the re-emphasis of *Milkovich* that there is no absolute First Amendment privilege for opinion.

The proper application of *Harte-Hankes* v. *Connaughton*, that a libel proof "opinion" defense is a question of fact for a jury and not of law for the court, is required and those facts must be considered, on review, by and from the whole and sum of the evidence. Once this evaluation is made, the reviewing court may then, and only then, under the rule of *Milkovich* v. *Lorain Journal Co.*, find a First Amendment protection for editorial opinion. *Milkovich* rejected the rule that language is not actionable if stated as opinion. If speech is provable as false, or, as in this case, reasonably implies underlying facts which are provable as false, then that speech may be defamatory. Since *Milkovich*, the reviewing court must decide, not whether the speech is fact or opinion, but whether the opinion implies facts provable as false and, if such language may be construed as defamatory, then the inquiry is properly a jury question.

In sum, while the Kentucky Court of Appeals clearly failed to consider any substantive law subsequent to *New York Times* v. *Sullivan*, and the respondents' cause should not be endorsed, this case presents the Court with the opportunity to bring much needed uniformity to the law of public figure defamation and should be heard. Therefore, the Court should grant the petition.

CONCLUSION

The Petition for a writ of certiorari should be granted.



Respectfully submitted,

ROBERT L. BERTRAM
BERTRAM & WILSON
One Monument Square
Jamestown, Kentucky 42629
(502) 343-3101
Counsel for Petitioner